

International Human Rights Law and Discrepancies With Recent Jurisprudence and US Asylum Law

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For many years, states have protected individuals and groups who were being persecuted and whose rights were being violated. Today's legislative body for the protection of human rights, though, is largely the product of the second half of the 20th century.

Together with international human rights law, refugee law originated for the most part in the aftermath of World War II as a result of the horrifying crimes that had been committed and the realization by the international community of the need for a legislative system that did not yet exist. Such body of law would have to be the product of a common international effort aimed at generating an enforceable and universally recognized authority that would represent an effective response in case of human rights violations.

Article 14(1) of the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, guarantees the right to seek and enjoy asylum in other countries. Subsequent regional human rights instruments have elaborated on this right, guaranteeing the "right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions."¹

Nowhere in the UDHR are the six grounds for seeking asylum so narrowly listed as they are on the I-589 asylum application.² In fact, the boxes to be checked give very limited options: race, religion, nationality, political opinion, membership in a particular social group, and torture convention.³ Many asylum applicants are thrown into a sort of general category of "particular social group" and thereafter must distinguish themselves from the general population by proving "particularity" and "social visibility." According to the Board of Immigration Appeals (BIA), "particularity" means that a group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.⁴ To meet the particularity requirement, a group must not be "too amorphous ... to create a benchmark for determining group membership."⁵ The BIA did not provide a definition of "social visibility" beyond stating that a particular social group's shared characteristic "should generally be recognizable by others in the community."⁶

Asylum law cannot be relegated to a limited and narrow interpretation so as to preclude legitimate applicants who have a verifiable claim.

The 1951 Convention Relating to the Status of Refugees contains what is still the most widely accepted definition of "refugee," but the convention leaves it to each state to create suitable and adequate asylum proceedings and refugee status determinations. As a result, there is not a unique and homogeneous international approach on the matter.

It is crucial that each state's legislative and judicial body, in ratifying and applying these principles, keeps what the ultimate goal of international human rights law is under consideration.

The United States is only a party to the protocol, but through its ratification of the protocol in 1968, it still committed to most of the obligations contained in the original 1951 document. As evidenced in 8 U.S.C. § 1101(a)(42), the convention's definition of "refugee" has

been adopted and assimilated into the U.S. domestic law. Under the Immigration and Naturalization Act the attorney general may grant asylum to a refugee⁷ who proves that he is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."⁸ Courts are required, whenever possible, to construe domestic law in a way that is consistent with international obligations.⁹ The 1980 Refugee Act that incorporated the protocol's definition of refugee into the Immigration and Nationality Act, did so by using practically the same language of the protocol. The choice of words was not accidental; Congress in fact was absolutely and unequivocally aware of the international obligations the United States had, and even the Supreme Court specified that "if one thing is clear from the legislative history of the new definition of 'refugee' and indeed the entire 1980 act, is that one of the Congress' primary purposes was to bring United States refugee law into conformance with the protocol, to which the United States acceded in 1969."¹⁰

Proving that one's persecution was carried out because of belonging to a "particular social group" is one of the ways to obtain asylum. The term "particular social group" is ambiguous.¹¹ The BIA first interpreted the term "particular social group" in *Matter of Acosta*.¹² The definition that emerged of "particular social group" enjoyed, and still does, significant influence with respect to the international development of the refugee definition. Numerous states and commentators have adhered to such interpretation.

In 2006, the BIA parted from and redefined the *Acosta* standard and, in *Matter of C-A-*, stated that an asylum applicant must also demonstrate that his proposed particular social group has "social visibility" and "particularity."¹³

Following this precedent, in *Santos-Lemus v. Mukasey*, the court concluded that the proposed group of "young men in El Salvador resisting gang violence" did not satisfy the social visibility requirement.

This requirement of "social visibility" as established by the BIA is directly against the purpose of the 1951 convention. Requiring that one makes himself visible at the eyes of the respective society, in a manner that is in the public view, would just expose a certain group of people to an enhanced risk of death or serious bodily harm. Noncriminal drug informants, for example, necessarily operate in anonymity; requiring them to make themselves visible would expose them to higher risks and could endanger both them and their families. Forcing already endangered people—such as religious minorities practicing their religious beliefs in secret to avoid persecution and homosexuals fearing abuse and mistreatment either by the state or by homophobic elements within their societies—to adhere to the social visibility requirement would expose them to the very human rights violations for which they are seeking protection.

Additionally, where the asylum seeker is a person resisting gang membership, the common characteristic is that members of the group "either cannot change, or should not be required to change." These asylum seekers are being punished because of their opposition and resistance to the commission of crimes. What value could be

more significant to one's identity than having the moral fortitude to oppose crimes and criminals? This is the common characteristic of the members of this social group and it is most certainly a characteristic that they should not be required to change. The fact that Central American gangs have continuously harassed, murdered, persecuted, and tortured victims in these countries seems for some illogical reason to be working against the asylum seekers. By this same logic, Jewish asylum seekers from Nazi Germany, where the Nazis were killing, torturing, and persecuting *all* Jewish people, would not meet the social visibility requirement because the phenomenon was extremely widespread. International human rights law has broad remedial purposes and it would be an oxymoron to try and incorporate it under state law through such narrow means.

Migration is certainly not a recent phenomenon. Since the beginning of human history, people have moved around the globe and played a fundamental role in shaping the world as we know it today. Migration has been essential in the creation of cultures, traditions, and religions; for example, the spread of Catholicism by Portuguese and Spanish conquerors during the 11th and 12th centuries had a significant impact on Christianity, the first and second migration to Abyssinia during Prophet Mohamed's time was momentous for Islam, and Jewish people have migrated several times to escape persecutions from Eastern to Western Europe and then overseas to the United States to escape the brutality of the Holocaust. The reasons behind migration are almost the same throughout all the centuries: escape from persecution, religious beliefs, pursuit of more promising economical scenarios, and flight from disastrous climatic events. This latter reason specifically is becoming more and more frequent in recent days. These so-called "environmental migrants" and the concepts of climate change and environmental degradation are expanding and becoming relevant issues.

In this scenario, it is clear how the phenomenon of migration is not only unstoppable, but that it also should not be stopped. Any state that has vowed to uphold human rights has a duty to work toward an efficient and logical management of the problem, where the goal should not be that of excluding, but that of regulating the influx in accordance with the national and international principles of human rights law.

Nowadays a percentage of asylum applicants are also individuals who came into the United States under certain protection programs or amendments, such as the Lautenberg Amendment. Such individuals, under current strict and prohibitive interpretation of the asylum requirements, might have a difficult time meeting all the requirements, including those for past persecution or well-founded fear of future persecution. The contradictions between current interpretation of the law and other previous government policies, as well as the principles of international human rights law, are many and apparent.

It is also apparent that the international legal framework and the intent of the international legislators is that of a liberal interpretation that would allow the realization of the framers' broad purpose. On the other hand, the BIA is currently narrowing the interpretation and the application of asylum laws, which is in opposition to the framers' intent. Article 1 of the 1951 convention and the U.S. asylum provisions, 8 U.S.C. § 101(a) and INA 101 (A)(42)(A), present significant similarity in their language and terms. Through logic, one would expect that this similarity also translates into a certain homogeneity of application and uniformity between international law and domestic U.S. law. Despite the explained similarities between international

norms and U.S. refugee law, the latter is significantly out of sync with the relevant treaties that have been established, and to which the United States is a signatory party.

Courts are clearly ignoring the international standard, principles, and methodology, and they are showing astounding disregard for the protection of asylum seekers as it has been requested—and framed—by the international community of legislators. This misalignment between U.S. law and international law regarding the remedies and legal treatment of asylum seekers results in a substantial denial of fairness and justice to people whose rights have been violated and who have a well-founded fear of being persecuted and cannot avail themselves of the protection of their country of origin.

The United States has international legal obligations concerning refugees since it has agreed to be bound by the 1951 convention, and it therefore should apply the convention principles in good faith and in accordance with the ordinary meaning to be given to them in the light of the convention's object and purpose. Currently the opposite is happening, with an interpretation of asylum law that is becoming stricter and stricter and is thus denying asylum seekers the justice they not only deserve, but also are granted under international law principles.

Therefore, the United States, through its courts, should revise its application of asylum laws, in a way that properly respects the international law principles that bound the United States as a signatory state of most relevant conventions in the matter of asylum law. ☉

Endnotes

¹Am. Conv. on H.R. art. 22(7).

²I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, OMB No. 165-0067, DEP'T OF HOMELAND SECURITY (May 16, 2017), <https://www.uscis.gov/sites/default/files/files/form/i-589.pdf>.

³*Id.* at 5.

⁴*Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008).

⁵*Id.*

⁶*Id.* at 586.

⁷8 U.S.C. § 1158(b)(1)(A).

⁸8 U.S.C. § 1101(a)(42).

⁹See *Weinberg v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Ali v. Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003).

¹⁰*INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

¹¹*Donchev v. Mukasey*, 553 F.3d 1206, 1215 (9th Cir. 2009).

¹²*Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

¹³*Matter of C-A-*, 23 I. & N. Dec. 951, 957, 960 (BIA 2006).